

8.3 Judge's Failure to Provide Immigration Advisement

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G.S. 15A-1022(a)(7) requires judges to provide a general advisement to a defendant before accepting a guilty plea, warning the defendant that if he or she is a noncitizen the conviction may result in adverse immigration consequences. A failure to provide the general advisement is a violation of the statute.

There is an argument that a trial court's failure to provide the advisement also affects the voluntariness of the plea and thus constitutes a violation of constitutional law as well. In *Padilla*, the Supreme Court recognized that immigration consequences of a criminal conviction are "uniquely difficult to classify as either a direct or a collateral consequence" of a guilty plea. *Padilla*, 559 U.S. 356, 366. The court further recognized that because deportation has such a "close connection to the criminal process" and is so significant for noncitizen defendants, the Sixth Amendment requires defense counsel to advise defendants about the immigration consequences of a conviction. *Id.* at 366–74. A similar argument can be made about a judicial advisement: that because deportation constitutes such a substantial and unique consequence of a plea, fundamental fairness requires the trial court to advise the defendant of that possibility. *See, e.g., People v. Peque*, 3 N.E.3d 617, 621 (N.Y. 2013) ("We therefore hold that due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony."). Under this rationale, a court's failure to give a noncitizen defendant at least a general advisement about immigration consequences may violate the constitutional requirement that the plea be knowing and voluntary.

Such an error may be present in some cases. From a practical standpoint, however, it may be easier to demonstrate a Sixth Amendment violation under *Padilla* than establish a Fifth Amendment violation that the plea was not knowing and voluntary.